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WOMEN UNDER THE LAW OF MASSACHUSETTS

HENRY H. SPRAGUE

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FROM

Women

Under the

Law of Massachusetts

Their Rights, Privileges, and Disabilities

By

Henry H. Sprague

Second Edition

Boston
Little, Brown, and Company
1903

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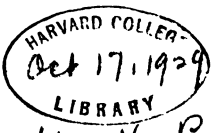

Augustin H. Parker.

B

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THE former edition of "Women under the Law" was published in the year 1884. It was prepared, as then stated, "with the purpose of pointing out in a simple manner, without the use of technical terms, the position reached and now occupied by women, so far as it is different from that of men, under the laws of this Commonwealth." The changes which have been made in the period of twenty years by successive statutes have rendered the statement then made entirely inadequate as an expression of the present status of the law. The endeavor is again made to state "the law as it now exists." Again the statement is offered to the public not as a legal treatise, but as simply an attempt to state intelligibly the rights, privileges, and disabilities of women under the law of Massachusetts, especially so far as they are different from those enjoyed by or imposed upon men.

BOSTON, April, 1903.

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WOMEN UNDER THE LAW OF MASSACHUSETTS

I

PAST LAW AND LEGISLATION

1. The Ancient Law

IN order to understand the present law of Massachusetts, as it specially affects men and women in their relations to each other and to the state, it is helpful, if not necessary, to recall the disabilities to which women were subjected in days which are removed, not only by lapse of time, but also by reason of the great changes which the constant advance in civilization has of necessity wrought in the manners and customs of the people, in their relations to each other, and in the relations of each to the state. The present legal status of women is far different from what it was under the harder theories and rigors of the common law. A radical change, or, as it might be termed, a revolution in their condition has been brought about by the successive statutes of this Commonwealth. While recalling the burdens and disabilities and restraints which were placed upon women in those remote times, it must also be remembered that men, too, in an almost equal degree, suffered

from restraints and duties and burdens which a ruder state of civilization imposed. From those ancient times have come our customs and our laws.

2. The Common Law

What is comprehended under the term, "common law," must be clearly understood, for the common law is the basis upon which rest all our modern statutes.

When our ancestors came and settled at Plymouth and in Massachusetts Bay, they did not bring with them any code of laws already compiled for their special use, which would apply in all the complicated questions which were to spring up among them about property and about persons, — as to what should become of a man's or a woman's property when he or she died, as to the way in which he could convey his land, as to the power a parent should have over his children, as to what offences should constitute crime, and how crime should be punished, and those innumerable questions which are not yet all answered in the two thousand pages of our Revised Laws. As our ancestors were English, they naturally assumed that the laws under which they had lived in England were in operation in their new home, so far as these would apply to their new circumstances.

The English law was founded upon and made up of old maxims and customs which were repeated and practiced previous to the time of printing and history, or, in the solemnity of the legal phrase, "time whereof the memory of man runneth not to the con-

trary." So, in every matter in relation to which no special law had been made by Parliament, some maxim or custom of this old unwritten law was invoked to decide it. These maxims and customs began with the sayings and doings of a time when each man was the subject or vassal of a petty king or lord, who assumed to rule over a small piece of territory, who was constantly fighting with the neighboring lord for more territory, and who allotted out the use of the land which he assumed to rule over, to the men who would help him fight his battles. The best fighters received the most favors. The lord made those customs prevail which best suited his purposes and necessities. His wishes and his needs were the prevailing laws of his dominion. In this way, what is termed the common law began; and it grew better as better customs grew up and better times inspired better maxims. This unwritten law, or common law, with the changes and additions made to it by the various Acts of Parliament, was the law of the land. It was the common law, so amended and reinforced, prevailing in England at the time our ancestors settled here, which they had for their law, so far as it would apply, until they also began to change it, in one way and another, by statutes passed by their representatives in council and legislature.

The common law, then, which prevailed as to the relations of men and women, became the basis of the colonial law. It might naturally be expected that the law in force at that early period would hardly suit the requirements of our present gentler and more enlightened and juster views, as, in a similar

way, the social relations which exist to-day between men and women in a rough pioneer life, would by no means correspond to the more refined and delicate social etiquette now prevailing in towns and cities settled a couple of hundred years ago.

It is interesting to recall some of the provisions of the common law at about the time of the coming of the Pilgrims and Puritans to these shores.

While a man was called on constantly to devote his life to the state, and to divide, in unpleasant proportions, his possessions with his lord and his king, it was the son who, to the exclusion of the daughter, received at the death of the father the whole of his father's lands, saddled, however, with the father's obligations to the king and the state. The husband, while his actions were so controlled by his superiors, could turn about and control and correct his wife. The loss of a man was then naturally a more serious matter to the state than the loss of a woman. Therefore, if a man killed his wife, it was the same as if he had murdered a stranger; but if a wife killed her husband, she was punished as if she had slain the king, for she had slain the king's defender, and she was sentenced to be drawn and burned alive as for treason. A husband might be punished, not only for his own offences, but also for most crimes, less than murder and treason, committed by the wife, if done in his presence. The husband took all his wife's personal property, but he was obliged to pay her debts.[1]

Some of the provisions of the common law regard-

[1] I Blackstone's Commentaries, 445 and note.

ing the mutual relations of men and women and husband and wife, never could come into practice here, as ill-adapted to the temper of our ancestors and to the requirements of a new country; but, generally speaking, the rules of the common law were regarded as binding, and in some cases were even reaffirmed; and they have continued to be in force, except as modified by the statutes which have from time to time established new rules.

3. Early Statutes

Some of the first statutes which were passed specially affecting men and women and their relations to each other, are curious and instructive. The first such law, made by the colony of Plymouth in the year 1633, is certainly a beneficent one, and was the foundation of our present statute authorizing the widow's allowance, as it is termed. It provides that a wife may administer on her husband's estate at his death, and "That in case a man die bankerout, as afore considering the rawnes of the countrey and the small meanes for help and reliefe can yet be afforded by others and that life must be preserved in the widow, children or both; and considering the cases of persons cannot be alike, but some may require more help some lesse, it is ordered & determined that whatsoever the Governor and Assistants shall allow the widow and fatherless or motherless in this kind for their preñt comfort shall be to them & their comfort, notwithstanding they dare not administer nor shall they be liable to any paym^{t} to

any the creditors of the dec[d] in respect thereof provided too great detriment come not to the creditors thereby." [1]

The next law of this kind was, on the other hand, for the benefit of the unmarried women, and was passed in the year 1638: "Whereas divers persons unfitt for marriage both in regard of their yeong yeares as also in regard of theire weake estate, some practiseing the enveagleing of mens daughters & maids under gardians contrary to their parents & gardians likeing and of mayde servants without leave and likeing of their masters. It is therefore enacted by the Court, That if any shall make any motion of marriage to any mans daughter or mayde servant not haveing first obtayned leave and consent of the parents or master so to doe shal be punished either by fine or corporall punishment or both at the discretions of the bench and according to the nature of the offence." [2]

A similar law passed by the Massachusetts Bay Colony in the year 1647 recited that "under pretence of purpose of Marriage before their Parents have given way and allowance in that respect, . . . it is a common practice in divers places for young men irregularly and disorderly to watch all advantages for their evil purposes, to insinuate into the affections of young Maidens by coming to them in places and seasons unknown to their parents for such ends, . . . to the dishonor of God and damage of parties;" and imposed penalties of fines and impris-

[1] Plymouth Colony Laws, Ed. 1836, pp. 32, 33.

[2] Plymouth Colony Laws, Ed. 1836, p. 61.

onment, upon any person who should endeavor "to draw away the Affection of any Maid in this Jurisdiction, under the pretence of Marriage, before he hath obtained liberty and allowance from her Parents or Governours or (in absence of such) of the nearest Magistrate."[1]

A statute which was passed by the General Court of the Massachusetts Bay Colony in the year 1650, cannot be complained of as dealing unequally with husband and wife: "No man shall strike his Wife, nor any Woman her Husband, on penalty of such fine not exceeding ten pounds for one offence, or such Corporal punishment as the County Court shall determine."[2]

Special protection was early afforded to women; and in the year 1711 it was enacted that whosoever should be convicted of assault upon or insolence "to any woman or womankind in the fields, streets, or lanes in any town, or of despoiling them, of damnifying or defacing any of their attire or ornaments, or attempting the same," should be punished by being publicly whipped not exceeding ten stripes, or by thirty days' imprisonment, and should give sureties to keep the peace. For a second offence, the offending party might be further punished by burning in the hand.[3]

In providing, in the year 1703, that no single persons of either sex under the age of twenty-one years should be suffered to live at their own hand,

[1] Colonial Laws, Ed. 1672, p. 101.
[2] Colonial Laws, Ed. 1672, p. 101.
[3] Province Laws, 1711–2, ch. 2, § 2.

but under some orderly family government, the General Court inserted a proviso, "that this act shall not be construed to extend to hinder any single woman of good repute from the exercise of any lawful trade or imployment for a livelihood, whereto she shall have the allowance and approbation of the selectmen or overseers of the poor, or the greater part of them, any law, usage, or custom to the contrary notwithstanding."[1]

In these days of political discussion, it is also interesting to note that, in the year 1696, not only a poll tax of four shillings was imposed upon all males of sixteen years and upwards, except ministers, professors, schoolmasters, and aged and infirm persons, but a poll tax of two shillings each was imposed upon "all single women that live at their own hand, except such as through age or extream poverty, in the discretion of the assessors, are unable to contribute to the publick charge."[2]

The Plymouth Colony, in the year 1636, took pains to declare "That inheritance do descend according to the commendable custom of Engl. and hold of Est. Greenwich; That if the husband die, the wife shall have a third part of his lands during her life, and a 3^{d} of his goods to be at her owne disposeinge," a statute from which we did not much depart until very recent years.[3]

As early as in the year 1641, the colonial government of Massachusetts Bay made provision that,

[1] Province Laws, 1703–4, ch. 14, § 2.
[2] Province Laws, 1695–6, ch. 6, § 1.
[3] Plymouth Colony Laws, Ed. 1836, p. 43.

when the husband or parents died intestate, the county court might assign to the widow such a part of the husband's estate as they should judge just and equal, and assign to the children their shares, provided that the eldest son should have a double portion, — a material change, as is observed, in the common law, which gave the real estate to the eldest son.[1]

4. Later Statutes

The changes were not so great, however, in the earlier periods; but, within the last sixty years, the statute amendments have been so many and so radical, that the common law is now but little more than the bare warp, into which the variegated threads of statutes have been woven, giving the tone and color and figure to the completed fabric.

The greater changes began in the year 1845. The wife was then allowed, by a contract made before marriage, to hold property to her separate use, to receive property by conveyance or devise to her separate use, and to hold such property with the same rights and liabilities as if she were unmarried; but she could not use the same in trade or commerce.[2] In the year 1846, her receipt for money earned or deposited by her was made a valid discharge.[3] In the year 1855, she was permitted to carry on business and to perform labor on her separate account, and to hold her earnings as her sepa-

[1] Colonial Laws, Ed. 1672, p. 158.
[2] Statutes of 1845, ch. 208.
[3] Statutes of 1846, ch. 209.

rate property; and it was further provided that the property which a woman thereafter married might own at the time of marriage, the profits and proceeds thereof, and the property which should come to her by descent, devise, or bequest, or by gift of any person except her husband, should be her separate property, independent of her husband's control, and not liable for his debts.[1] In the year 1857, these provisions were extended to the property of all women then married.[2] Other changes have followed fast from year to year, those of the year 1874 and those incorporated into the last revision of the statutes being the most important.[3]

[1] Statutes of 1855, ch. 304.
[2] Statutes of 1857, ch. 249.
[3] Statutes of 1874, ch. 184. Revised Laws.

II

PUBLIC PRIVILEGES AND DISABILITIES

IT is more especially proposed here to show, as far as practicable, the status of women, both in their public and private relations, under the present law of Massachusetts, especially as it is different from that of men.

1. Citizenship and Naturalization

Citizenship is shared alike by men and women. The Constitution of the United States provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[1]

The United States statutes regulating the subject of naturalization provide not only that women may be naturalized in the same way as men, but further provide that "any woman who is now or may here-

[1] U. S. Constitution. 14th Amendment. Sec. 1.

after, be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."[1]

This statute was passed in the year 1855, prior to the adoption of the constitutional amendment, and the phrase, "who might herself be lawfully naturalized" was held to limit the application of the law to free white women. The restriction is of course now done away with, and it is also provided by statute that the provisions of law relating to naturalization shall apply not only to free white persons and to aliens who are free white persons, but also to aliens of African nativity and to persons of African descent.[2]

It has been held that the wife's citizenship follows that of her husband without even application for naturalization on her part, or the usual qualifications, and that it is immaterial whether the husband's citizenship existed at the passage of the act or subsequently, or before or after the marriage, or whether she is of full age. A woman's marriage to a citizen makes her a citizen, although she may have lived for years at a distance from him and may never have come to this country until after his death. The wife's citizenship is not lost by her surviving her husband, but it may be lost by her marrying an alien.[3]

Under these provisions an alien woman by marry-

[1] U. S. Stats. Sec. 1994.

[2] U. S. Stats. 2169, as amended by St. 1875, ch. 80, § 1, par. 27.

[3] Gould & Tucker's Notes on Rev. Stats. of U. S. quoting cases, Ed. 1889, page 479, notes on Sec. 1994.

ing a citizen, or by the naturalization of her husband, becomes entitled to vote for school committee in Massachusetts, upon a single year's residence.

2. Voting at Elections

The right to vote is not one of the privileges or immunities of citizens of the United States, which, under the provisions of the fourteenth amendment of the United States Constitution, no state shall abridge.[1]

The Constitution of the Commonwealth gives the privilege of voting at elections for governor, lieutenant-governor, senators, and representatives to the legislature, to male citizens of twenty-one years of age and upwards (excepting paupers, persons under guardianship, and such persons as are unable otherwise than by a physical disability to read the Constitution in the English language and to write their own names or had the right to vote or were sixty years of age on May 1, 1857), who have resided within the Commonwealth one year, and within the town or district in which they claim the right to vote, six calendar months preceding the election.[2] None others can vote for governor, lieutenant-governor, senators, or representatives; except that no person having served in the army or navy of the United States in time of war, and having been honorably discharged from such service, if otherwise qualified to vote, shall be disqualified therefor on account of

[1] Stone *v.* Smith, 159 Mass. 413.

[2] Arts. of Amendment, III., XX., XXXII.

receiving or having received aid from any city or town;[1] and no person shall be disqualified by reason of a change of residence within the Commonwealth, from voting for said officers in the city or town from which he has removed, until the expiration of six calendar months from the time of such removal.[2] The Constitution is silent as to the qualifications required for voting for all other officers than those above specified.

It is a question, as yet undecided, whether the legislature has the power to provide that women may vote for officers created by the Constitution other than those named, as for instance, for councillors, secretary, treasurer, auditor and attorney-general, sheriffs, registers of probate and clerks of courts. From the fact that certain duties are given by the Constitution to the selectmen and town clerks relative to the election, in towns, of governor, senators and representatives, it has also been suggested that the legislature cannot under the Constitution give to women the right to vote for these officers in towns. The legislature may, however, determine who shall be permitted to vote for officers created by statute, but whose election is not determined by the Constitution.[3]

Under the power above expressed the legislature has given to women the right to vote for members of the school committee. It is provided that every female citizen of twenty-one years of age or upwards, not being a pauper or person under guardianship,

[1] Art. of Amendment, XXXI.
[2] Art. of Amendment, XXX.
[3] Opinion of Justices, 115 Mass. 602.

who is able to read the Constitution of the Commonwealth in the English language and to write her name, and who has resided within the Commonwealth one year and within the city or town in which she claims a right to vote six calendar months last preceding an election for school committee, may have her name entered upon the list of voters for school committee in such city or town, and shall have the right to vote therein in every such election for members of the school committee, upon complying with the requirements of the election laws; and, except as aforesaid, no female person shall have her name entered upon the list of voters or have the right or be allowed to vote, except that no female person who is prevented from reading or writing as aforesaid, by a physical disability shall, if otherwise qualified, be deprived of the right to vote by reason of not being able so to read or write.[1]

By the Constitution of the United States, the same qualifications are required of electors of representatives to Congress as are required by the state to qualify a person to vote for members of the state house of representatives;[2] but the legislature is given the power to prescribe the qualifications required to vote for presidential electors.[3]

Women, therefore, cannot be empowered to vote for governor, lieutenant-governor, state senators, or representatives to the legislature, or for representatives to Congress, except by a change in the state

[1] R. L., ch. 11, §§ 12, 13.
[2] U. S. Const. Art. I., § 2.
[3] U. S. Const. Art. II., § 1.

Constitution, which would require the assent of the legislature for two successive years with a two thirds vote in each year in the house of representatives, and the subsequent affirmative vote of the people. The legislature may, however, by a majority vote in any year, as it has done in the case of permitting women to vote for school committee, enable women to vote for presidential electors, and for other officers whose election is not directly or impliedly determined by the Constitution.

Women by statutes are now entitled to vote only for members of the school committee.

3. Holding of Office

There is nothing in the Constitution or statutes of the Commonwealth which directly prohibits women from holding office; and, although it is regarded as a general rule that officers are to be chosen from the general body of the electors, this rule can hardly be considered imperative without express enactment.

The Supreme Court has given an opinion that a woman cannot be legally appointed a justice of the peace. The opinion of the court is as follows: "By the Constitution of the Commonwealth, the office of the justice of the peace is a judicial office, and must be exercised by the officer in person, and a woman, whether married or unmarried, cannot be appointed to such an office. The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the

universal understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other."[1] All judges and other judicial officers in this Commonwealth must, under the Constitution, be appointed by the governor.[2]

The court, on the other hand, has held that, under the Constitution, a woman might be a member of a school committee, since the Constitution is silent upon the question, and the common law permitted a woman to fill any local office of an administrative character, the duties of which were such that a woman was competent to perform them. The court, also, further declared that the Constitution confers upon the legislature full power and authority to provide by law "for naming and settling all civil officers within the Commonwealth, the election and constitution of whom are not in the Constitution otherwise provided for."[3] A statute, also, passed in the year 1874, permitted women to become members of a school committee.[4]

Still later, in the year 1881, the court gave an opinion that a woman was not entitled under the statute, as it then existed, to admission as an attorney or counsellor before the courts. It declared in this opinion that, by the law of England at the time of our separation, no woman under the degree of a queen, married or unmarried, could take part in the govern-

[1] Opinion of Justices, 107 Mass. 604.
[2] Mass. Const. Ch. II., Sec. I, Art. IX.
[3] Opinion of Justices, 115 Mass. 602 (1874).
[4] Statutes of 1874, ch. 389; R. L., ch. 11, §§ 12, 13.

ment of the state, and added, more pointedly, that a woman is not by virtue of her citizenship vested by the Constitution of the United States, or by the Constitution of the Commonwealth, with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer; and, further, that there is nothing in the action of the legislature or of the judiciary, having any tendency to prove that there has been such a change in the law or the usage, prevailing at the time of the separation, as to admit women to the exercise of any office that concerns the administration of justice.[1] In the following year (1882), women were permitted by statute to practise as attorneys at law;[2] and, in the year 1883, authority was given the governor to appoint women, who are attorneys at law, special commissioners to administer oaths and to take depositions and acknowledgments of deeds.[3]

It is now provided that women who are twenty-one years of age may be appointed as special commissioners, with like power and fees as justices of the peace, to administer oaths, to take depositions, affidavits, acknowledgments of deeds and other instruments, to issue summonses for witnesses, and to appoint appraisers in all cases. If the name of the special commissioner is changed her commission will terminate, but she may be appointed under her new name.[4]

[1] Robinson's case, 131 Mass. 376; R. L., ch. 165, § 41.
[2] Statutes of 1882, ch. 139.
[3] Statutes of 1883, ch. 252.
[4] R. L., ch. 17, §§ 5, 6.

In the year 1890 the court gives its opinion that, in the absence of any statute authorizing their appointment, women cannot lawfully be appointed notaries public, although the office is not a judicial one. The Constitution, though providing for the appointment of notaries without prescribing their duties, being interpreted with reference to the history and nature of the office and the long continued and constant practice here and the usage elsewhere, cannot be construed as authorizing the appointment by the governor of women as notaries.[1]

The Supreme Court of Maine, declaring that the Constitution of that state is modelled upon that of Massachusetts, and holding that women could not be appointed justices of the peace, assumed that, as the Constitution of Maine was adopted by the male inhabitants under their separation from Massachusetts, all the offices created by the Constitution are to be filled exclusively by males, but that the legislature can create new ministerial offices, not enumerated, to be filled by either sex.[2]

It would seem, therefore, that women cannot, without a change in the Constitution, hold offices which are established by the Constitution, or which would entitle them to take part in the direct government of the state itself, or would give them the exercise of judicial powers; but that they may, by vote of the legislature, be appointed or elected to other offices;[3] and it is probable that, without legislative authority,

[1] Opinion of Justices, 150 Mass. 586.
[2] Opinion of Justices, 62 Me. 596, et seq.
[3] Leonard's case, 136 Mass. 578.

they may be elected or appointed to offices of simply a local administrative character, such as women are ordinarily competent to fill. They are elected, without special statute authority, to some local offices, and are in many cases appointed without distinct legislative authority, upon charitable, educational, and reformatory boards.

The legislature has from time to time provided that women shall be appointed, in certain numbers or fixed proportions to men, to membership of various Boards and other positions: — as members of the Board of Prison Commissioners;[1] as Trustees and assistant Physicians of the State Hospitals for the Insane,[2] and for Epileptics;[3] as Trustees of the State Hospital and State Farm;[4] as Trustees of the State Industrial School for Girls at Lancaster, and the Lyman School for Boys at Westborough;[5] as visitors to the State Hospital and the Lyman School for Boys;[6] as police matron in police stations in cities designated for the detention and lodging of women;[7] and as assistant teachers in public schools having an average of fifty pupils unless the town votes otherwise.[8]

Women are also expressly made eligible to appointment in various positions: — as Overseers of the Poor and members of the School Committee;[9] Trustees of Town Libraries;[10] Members of the Board of Regis-

[1] R. L., ch. 222, § 1.
[2] R. L., ch. 87, §§ 18, 19, 20, 27.
[3] R. L., ch. 87, § 21.
[4] R. L., ch. 85, § 1.
[5] R. L., ch. 86, § 1.
[6] R. L., ch. 84, § 5.
[7] R. L., ch. 108, § 32.
[8] R. L., ch. 42, § 17.
[9] R. L., ch. 11, § 334.
[10] R. L., ch. 38, § 7.

tration in Dentistry;[1] as assistant Town Clerks;[2] as clerks pro tempore of the County Commissioners;[3] as agents for assistance to discharged female prisoners;[4] as assistant probation officers in district, police and municipal courts;[5] as assistant Registers of Deeds;[6] as assistant Registers of Probate in Bristol, Hampshire and Hampden counties;[7] and as assistant clerk for the county of Hampden.[8]

It should be noted that, under the Constitution, no person, male or female, is eligible to office in the Commonwealth who is not able to read the Constitution in the English language and to write his name, excepting, however, persons prevented by physical disability from complying with these requisitions and persons having the right to vote or being sixty years of age and upwards on the first day of May, 1857.[9]

4. Taxation

Women are freed from certain disabilities or duties to which men are subject. They are not obliged to pay a poll tax; but every male inhabitant above the age of twenty, except certain persons who are excused or unable to contribute by reason of age, infirmity, or poverty, is liable to pay a poll tax of two dollars.[10] The payment of a poll tax is, however, no longer a pre-requisite for voting.[11]

[1] R. L., ch. 76, § 24.
[2] R. L., ch. 25, § 62.
[3] R. L., ch. 20, § 19.
[4] R. L., ch. 225, § 137.
[5] R. L., ch. 217, § 81.
[6] R. L., ch. 22, § 8.
[7] R. L., ch. 164, § 17.
[8] R. L., ch. 165, § 4.
[9] Art. of Amendment, XX.
[10] R. L., ch. 12, §§ 1, 5.
[11] Art. of Amendment of Constitution, XXXII.

Taxes are imposed alike upon the property of males and females, except that the property of a widow, or unmarried woman above the age of twenty-one years, to the amount of five hundred dollars, is exempt, if her whole estate does not exceed one thousand dollars exclusive of property otherwise exempted by law.[1] Soldiers and sailors are under certain circumstances exempt from taxation, but a like exemption is given to widows of soldiers and sailors who would be entitled to exemption under the same circumstances.[1]

5. Military and Jury Duty

Except paupers, common drunkards, vagabonds, persons mentally incompetent or convicted of infamous crimes, Quakers and Shakers having conscientious scruples against bearing arms, and except certain persons who are exempt on account of the holding of office or on account of the nature of their employment, every able-bodied male citizen, of the age of eighteen years and under the age of forty-five years is enrolled in the militia, and subject to be called into active duty in the field in case of war, invasion, riots, and in aid of the execution of the laws.[2]

With similar exceptions, all qualified to vote for representatives to the General Court are liable once in three years to be drawn and to be compelled to serve upon the jury, — a liability which can hardly be regarded, considering the small sum paid and the summary demand made for their services, to be otherwise

[1] R. L., ch. 12, § 5. [2] R. L., ch. 16, §§ 2, 3, 4, 6.

than as a public duty and hardship, so far as many of the jurors are concerned.[1]

6. Arrest for Debt

Women are exempted from the operation of statutes which authorize an arrest of the person in civil actions, before a judgment is obtained and execution is issued by the court, except in actions for tort, that is, for trespass, wrongful conversion of property, and other wrongful acts for which penalties in money are imposed.[2]

7. Settlement

While, in general, a man having no settlement within the state can acquire such settlement in any city or town, so as to become entitled to relief from the city or town in case of poverty or need, by paying all the taxes assessed upon him for three out of five successive years of residence, a married woman acquires a settlement in any city or town through her husband's settlement; and also any woman of the age of twenty-one years, including a married woman who has no settlement by marriage, and a widow, if she has not already a settlement, will acquire one by her own residence in a city or town for five years together, without any such condition.[3]

[1] R. L., ch. 176, §§ 1–3. [2] R. L., ch. 168, § 3.
[3] R. L., ch. 80, § 1.

8. Majority and Age of Consent to Marriage

The popular belief that a female becomes " of age " or reaches her majority, so that she may act and her acts are binding, at the age of eighteen rather than of twenty-one years, the period at which a male reaches his majority, is incorrect, the chief difference between males and females in this respect being that a female may contract a valid marriage, even without the consent of her parents, at the age of twelve, and a male at the age of fourteen years.[1] The clerk or registrar of a city or town is, however, liable to a penalty, if he issues a certificate of intention of marriage having reasonable cause to believe the female to be under the age of eighteen years or the male to be under the age of twenty-one, without the consent of the parent, master, or guardian of such person; and a magistrate or minister is prohibited, under penalty, without such consent, from marrying parties when he has reasonable cause to believe the male to be under the age of twenty-one years or the female to be under the age of eighteen years, provided there is any such parent, master, or guardian within the Commonwealth competent to act.[2] It is further provided that if the male is under the age of eighteen years or the female is under the age of sixteen years, the clerk or registrar shall not issue a marriage certificate except upon an order of the judge of probate of the county issued after due hearing and with the consent of the father of the minor if living, or, if deceased, of the

[1] Parton *v.* Hervey, 1 Gray, 119.
[2] R. L., ch. 151, §§ 25, 7, 22.

mother, or, if there is no surviving parent resident in the Commonwealth, then of a legal guardian.[1]

It has been recently provided, however, that the signature of a married woman under the age of twenty-one years, affixed by her to any instrument relating to the conveyance of land of her husband, will have the same effect as if she were over that age;[2] and it is possible that, by the operation of a change made by the Revised Laws of 1902, a married woman, though under the age of twenty-one years, may make a will.[3]

9. Labor and Other Protection

Various statutes have been enacted from time to time for the protection of both women and children employed in labor, which are not applicable to men. It is provided that women and children shall not be employed in laboring in mercantile, manufacturing and mechanical establishments more than fifty-eight hours in a week;[4] that they shall not be employed in any capacity for the purpose of manufacturing between ten o'clock at night and six o'clock in the morning;[5] and that certain regulations shall be enforced as to their meal-times and as to limiting their hours of continuous employment in factories and workshops;[6] and that in manufacturing, mechanical and mercantile establishments females shall be permitted the use of seats when not necessarily engaged in active employment.[7]

[1] R. L., ch. 151, §§ 19, 20.
[2] St. 1902, ch. 478.
[3] R. L., ch. 135, § 1.
[4] R. L., ch. 106, §§ 23, 24.
[5] R. L., ch. 106, § 27.
[6] R. L., ch. 106, §§ 36, 37.
[7] R. L., ch. 106, § 41.

Provision is made that proper sanitary arrangements shall be made and enforced in establishments and offices where women and children are employed, and arrangements for proper ventilation are required in such establishments.[1] Deductions from their wages are forbidden in cases of stoppage or breaking down of machinery.[2] Special provisions are made for compelling adequate means of egress from factories, workshops, mercantile, and other establishments in which they are employed, in case of fire.[3] Railroad corporations are prohibited from requiring them to ride in smoking cars.[4]

Many penalties have been imposed for special crimes against women.

[1] R. L., ch. 106, §§ 47, 48, 49, 51, 52.
[2] R. L., ch. 106, § 69.
[3] R. L., ch. 104, § 25.
[4] R. L., ch. 111, § 235.

III

PROPERTY. — RIGHTS AND DISABILITIES OF MARRIED WOMEN

IN the preceding pages, it is believed, are substantially set forth the inequalities or differences made by the Constitution and the statutes between males and females independently of the marriage relation.

The most of the differences which have been imposed by the law have been those affecting men and women in their relations of husband and wife only; and, aside from the question of suffrage, the most of the so-called disabilities relative to rights in property of which complaint has been made have been those to which married women alone have been subject.

1. Holding of Property

The legal status of married women was fixed by the common law, as has been said, and on the theory that the husband and wife were one person, "the very being and legal existence of the wife," said Blackstone in his Commentaries, "being incorporated into that of her husband, under whose wing, protection and cover she was supposed to do everything; whence she was called *feme covert*," and her legal status her coverture. From this theory can be traced nearly all the former or existing disabilities of married women.

Yet the very disabilities which the common law laid upon the wife were, for the most part, intended said Blackstone again, in his Commentaries, for her protection and benefit, "so great a favorite is the female sex of the laws of England"![1]

Under the common law, the husband had the control and income of the real property, and the management and disposal, if he chose to exercise it during her life, of the personal property which was the wife's at the time of her marriage, and which came to her during her marriage; and she could hardly do any act in relation to her property during his life, at least without his consent and joining with her. All this, however, has been changed by successive statutes in Massachusetts.

A married woman now holds as her separate property, free from the control and interference of her husband, whatever real or personal property she has at the time of her marriage, or whatever comes to her during marriage, or whatever she acquires by business or labor carried on or performed by her on her separate account, with the rents and income of all such property.[2] As has been declared by the court, she may now hold her separate property in the same manner as if she were sole, with the same rights and privileges, and subject to the same rules, responsibilities and liabilities as a single woman;[3] the husband cannot by taking possession of her personal property make it his own.[4]

[1] I Blackstone, 442, 445.
[2] R. L., ch. 153, § 1.
[3] Pacific National Bank *v.* Windram, 133 Mass. 175.
[4] Ago *v.* Canner, 167 Mass. 390.

To this general rule there was, previous to the year 1885, one exception. It seemed that if real property was devised or conveyed to the husband and wife, the husband had, while both were living, the entire control and income of the real property; but, at the death of either, the real property became the entire and absolute property of the other.[1] Property so devised or conveyed since the year 1885, however, is held equally by the husband and wife, one half by each, unless a different intent is manifestly expressed in the devise or conveyance.[2]

It is, however, necessary that a wife should keep the money and other personal property, which she receives, separate and distinguishable from that of her husband. She cannot hold such property against his creditors and heirs, if she allows it to be so mixed with his that it cannot be ascertained and separated.[3] If a married woman buys articles of furniture, for instance, partly with her own money and partly with her husband's money, and does not discriminate from the rest and hold a part as her own, and there is nothing in any of the articles to indicate that they were for her exclusive use, or other indication that she has a right to a part of them, she cannot claim any part.[4]

It is expressly provided that wages due on account

[1] Wales *v.* Coffin, 13 Allen, 213, 215; Pierce *v.* Chace, 108 Mass. 254, 258.

[2] St. 1885, ch. 237; R. L. ch. 134, § 6.

[3] McCluskey *v.* Provident Institution for Savings, 103 Mass. 300.

[4] Kelly *v.* Drew, 12 Allen, 107.

of the personal labor or services of the wife cannot be taken under the trustee process in a suit against the husband.[1]

As to wearing apparel, if articles of clothing and personal ornament are purchased, not with the wife's money or earnings, but with her husband's earnings, or upon his credit, the fact that they are selected and purchased by her, and intended for her personal and exclusive use, does not render them any the less his property. Though the husband and wife work together, while she may keep her earnings separate, if she sees fit to do so, if she allows them to be mingled with her husband's, and if her clothing is purchased with money from the common fund, such clothing becomes her husband's property. She receives the money to buy clothing and expends it, as his agent, in payment of articles which he is bound to supply, under his legal obligation to support and clothe her as his wife.[2] However, the necessary wearing apparel of the wife and children are by statute exempted from attachment by the husband's creditors;[3] and, after his death, the articles of apparel and ornaments of the widow are made to belong to her.[4]

It seems still to be the case that, in order that the wife may hold her property free from her husband's control and from his creditors, it must appear affirm-

[1] R. L., ch. 189, § 31, cl. sixth.

[2] Hawkins *v.* Providence & Worcester R. R. Co., 119 Mass. 596.

[3] R. L., ch. 177, § 34.

[4] R. L., ch. 140, § 1.

atively that she acquired it as her property, and that the common law presumption still remains, nothing appearing to indicate the contrary, that personal property or money in the possession of the wife belongs to the husband, and as such is subject to his disposal, and can be taken on attachment or execution by his creditors. Upon this presumption, it was held that a thief who stole a purse from the pocket of a married woman, in the absence of any direct evidence in regard to the ownership, was properly charged as having taken the property, not of the wife, but of the husband.[1]

It appears, however, that if it is found not only that the wife buys articles with her own money but also that she buys articles which she orders to be charged to her and promises to pay for them, such articles will be presumed to be her property.[2]

Special protection is afforded by statute to married women in relation to life insurance policies. It is provided that a policy of life insurance, made payable to or for the benefit of a married woman, or assigned or made payable to her, or in trust for her, whether procured by her, her husband, or any other person, or assigned to her by her husband or by any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors.[3]

[1] Comm. *v.* Williams, 7 Gray, 337; Tracy *v.* Keith, 11 Allen, 214. See also Marshall *v.* Jaquith, 134 Mass. 138.

[2] Gordon *v.* Dix, 106 Mass. 305.

[3] R. L., ch. 118, § 73.

It has been expressly provided by statute that on the petition of a married woman having separate property, a trustee may be appointed by the court to hold the same upon such trusts as she may declare in conveying the property to him; and the trustee may prosecute or defend any suit in relation to such property brought by or against her.[1]

2. Engaging in Business on Separate Account

If a wife is doing business on her separate account, in order that the property employed in such business shall not be liable to be attached as the property of her husband, or to be taken by his creditors on execution against him, she must record in the office of the city or town clerk a certificate of the fact of so doing business and the name under which the business is carried on, which shall not be the name of her husband. If the wife neglects to record such certificate, the husband may do so. In case no certificate is recorded by either husband or wife, the property employed in such business is liable to be attached and taken as the property of the husband; and the husband will be liable upon all contracts lawfully made in the prosecution of the business, the same as if such contracts had been made by himself.[2]

The statute does not in any way impair the right of a married woman to do business on her separate account, or relieve her from liability on account of her contracts. The question whether in such case the business, or the property employed in such busi-

[1] R. L., ch. 153, § 12.

[2] R. L., ch. 153, § 10.

ness, is the husband's or the wife's, is often embarrassing and complicated.[1] The object of the statute is to simplify the matter by compelling such a definite statement, and thus, as has been stated by the court, to afford the means of ascertaining in which of the two persons, apparently in the possession and use of property in carrying on trade or an occupation, the title is vested, so that all having occasion to transact business with either may regulate their dealings accordingly.[2] The recording of the certificate protects the wife's property from the risk of attachment by creditors of her husband, and relieves him from all liability on her contracts.

The statute is not confined in its application to cases in which a married woman engages in trade, in the ordinary sense of the word, or in the manufacture of goods for sale; but it includes any business on her sole account by which she supports herself and her family, and which is carried on with funds and other means belonging to her. The carrying on of a farm and the keeping of a boarding-house for the support of the family have been held to be occupations coming within the application of the statute. On the other hand, it is stated that there may be uses of the property of a married woman on so small and trivial a scale as not to come within the meaning of such a separate business; and the use of a horse and carriage, the procuring of stabling for the horse or repairs for the carriage, the raising of crops for her own use on her own land, the erection or repair of

[1] Feran *v.* Rudolphsen, 106 Mass. 471.

[2] Chapman *v.* Briggs, 11 Allen, 546.

her dwelling-house, the purchase of materials and furniture for herself and family, are all enumerated as uses of property not amounting to a separate business within the intent of the statute.[1]

It is only the personal property of a married woman, and not her real property, which is thus liable to be attached or to be taken on execution by her husband's creditors.[2] Debts due on account of the business, as, for instance, from boarders to a married woman who is keeper of a boarding-house, are considered a part of the property employed in such business, and therefore liable to be taken by her husband's creditors.[3]

Although the husband may be liable on account of a failure to file a certificate, the wife may also be liable for goods bought on her separate account.[4]

The statute will not apply to the case of a married woman doing business in this Commonwealth, whose husband was residing and had a domicile in good faith in another state.[5]

The failure to file such certificate does not give the husband any authority to dispose by sale or mortgage of the separate property of the wife employed in such business, or to impose any other lien thereon in favor of his creditors.[6]

[1] Snow *v.* Sheldon, 126 Mass. 332; Proper *v.* Cobb, 104 Mass. 589; Lockwood *v.* Corey, 150 Mass. 82; Desmond *v.* Young, 173 Mass. 90.

[2] Bancroft *v.* Curtis, 108 Mass. 47.

[3] Dawes *v.* Rodier, 125 Mass. 421.

[4] Browning *v.* Carson, 163 Mass. 255.

[5] Hill *v.* Wright, 129 Mass. 296.

[6] Merrill *v.* Parker, 112 Mass. 250.

3. Contracts between Husband and Wife

A married woman may make contracts, oral and verbal, sealed and unsealed, for the fulfilment of which she and her property shall be held liable, and she may sue and be sued in the same manner as if she were sole, except that the provisions of the statute do not authorize her to contract with her husband, or authorize suits between husband and wife.[1]

Any work or labor which the wife performs for any one other than her husband and children, is, unless there is an express agreement on her part to the contrary, to be presumed to be performed on her own or separate account; and she, and not her husband, is entitled to collect the payment for any such labor.[2]

A married woman will not be liable for the debts of her husband, nor will her property be liable to be taken on an execution against him[3] except under the provisions relative to a married woman's doing business on her separate account.

The husband will not be bound by, nor will his property be held liable for any contracts made by his wife in respect to her separate property, trade, business or labor services, except in the case of his or her failure to record a certificate as before set forth, when she does business on her separate account, but she and her separate property will be liable on such contracts in the same manner as if she were sole.[4]

[1] R. L., ch. 153, §§ 2, 6.
[2] R. L., ch. 153, § 4.
[3] R. L., ch. 153, § 7.
[4] R. L., ch. 153, § 9.

By virtue of the recent legislation, the court has declared that a married woman becomes, in view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor and is entitled to her wages or earnings. If she complies with the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account and take the profits, if profits there are, as her separate property. These rights are inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade.[1]

The statutes, says the court, in enlarging the capacity of a married woman to hold and deal with property, and in removing many of the disabilities under which she was placed by the common law, have not conferred upon the husband and wife new powers or authority to contract with each other, or to transfer property to each other (except gifts by the husband to the wife to a limited amount), nor have they authorized suits between husband and wife. They are not authorized to complicate the common law theory that they are one, by suing each other or by making any contract with or sale to

[1] Harmon *v.* Old Colony R. R., 165 Mass. 100.

each other.[1] The wife, though she may become a partner with others, cannot enter into a business partnership with her husband or with a firm of which her husband is a member; [2] and neither can make a personal contract with a partnership of which the other is a member.[3] The husband and wife may, however, make a joint contract with a third person.[4] If a husband or wife lends money to the other, neither can collect it from the other, though the other repeatedly promises to repay it; [5] nor will the promissory note given by one to the other be of any legal effect.[6]

This disability to contract with each other would, however, not prevent the husband from returning to the wife any money previously placed by her in his keeping; and such return would not be held a gift, and could not be invalidated by the husband's creditors, if made without any fraudulent intent.[7] A husband may, in payment for money loaned him by his wife, give a note to a third person to hold for his wife's benefit; though, if the note were given directly to her, it would be invalid; and if such third

[1] R. L., ch. 153, §§ 2, 3, 6; St. 1884, ch. 132; Atlantic National Bank *v.* Tavener, 130 Mass. 407, 409; Fowle *v.* Torrey, 135 Mass. 87, 89.

[2] Plumer *v.* Lord, 5 Allen, 460; Lord *v.* Parker, 3 Allen, 127; Edwards *v.* Stevens, 3 Allen, 315; Bowker *v.* Bradford, 140 Mass. 521.

[3] Fowle *v.* Torrey, 135 Mass. 87, 93; Clark *v.* Patterson, 158 Mass. 388.

[4] Major *v.* Holmes, 124 Mass. 108.

[5] Bassett *v.* Bassett, 112 Mass. 99.

[6] Ingham *v.* White, 4 Allen, 412.

[7] Snow *v.* Paine, 114 Mass. 520, 525.

person should indorse the note to the wife, it would not be extinguished, though the right to enforce it by suit would be suspended so long as the wife should hold it.[1] She could transfer the note to a third party who could collect it against the husband, or she could collect it from his estate after his death.[2] If a husband or wife erect buildings upon, or otherwise improve the land belonging to the other, no recompense can be obtained, or right gained, by the one who so improves the land of the other.[3]

If a man and woman should make a contract with each other, to be performed presently or during marriage, except a contract for marriage or in the nature of a marriage settlement, and then intermarry, it has been held that the marriage would make the contract void.[4] Consequently, a note given by one to the other before marriage, was declared to become void by the marriage.[5]

It has, however, been declared that the policy of recent legislation has been to impair the unity or identity of interest between husband and wife which existed at common law, and that the incidents and consequences of this unity ought not to continue to operate, and it has been held that such contracts were not extinguished by the marriage of the parties,

[1] Butler *v.* Ives, 139 Mass. 202; Spooner *v.* Spooner, 155 Mass. 52. See also Degnan *v.* Farr, 126 Mass. 297.

[2] Spooner *v.* Spooner, 155 Mass. 52.

[3] Washburn *v.* Sproat, 16 Mass. 449.

[4] Miller *v.* Goodwin, 8 Gray, 542; Deshon *v.* Wood, 148 Mass. 132.

[5] Abbott *v.* Winchester, 105 Mass. 115.

but that the right to enforce them was suspended during marriage.[1]

The husband can act as agent for his wife in buying and selling for her, and in other transactions. He can thus take her money and buy property for her, and receive it in her name.[2] Of course, the wife can in the same manner act as agent for her husband.

It is, however, often difficult to distinguish cases in which one acts as agent for the other, from those in which it is attempted to make contracts with each other or gifts from one to the other. In a case in which a husband purchased certain property in his wife's name, and paid for it partly with her money and partly with his own, it was held that, notwithstanding he so paid a part of the price, he acted as her agent, and the property was hers.[3] Such property will not be subject to attachment by the husband's creditors. It must appear that the wife's money was paid for the purpose of purchasing the property for her, and not that it was simply advanced to him to help make up the consideration he was to pay.[4]

It has even been held that, if a husband sends his wife money, and directs her to purchase a house and to take the deed in her name, so that if misfortune comes to him she may have a home, still the house

[1] Butler *v.* Ives, 139 Mass. 202; Martin *v.* Martin, 146 Mass. 517.

[2] McCowan *v.* Donaldson, 128 Mass. 169; Merrick *v.* Plumley, 99 Mass. 566; Binney *v.* Globe National Bank, 150 Mass. 574.

[3] McCowan *v.* Donaldson, 128 Mass. 169.

[4] Snow *v.* Paine, 114 Mass. 520.

will belong to her, except, of course as against his creditors.[1]

4. Gifts between Husband and Wife

It is laid down as a general rule that a husband and wife cannot make valid gifts to each other; but this is not strictly true, even with the statute exception.[2] The statutes now provide that a wife may receive from her husband as a gift, and to be held as her separate property, wearing apparel, articles of personal ornament, and articles necessary for her personal use, to a value of not more than two thousand dollars, if such gift is not made by the husband in fraud of his creditors.[2] There is no such statute exception in favor of the husband.

What are articles necessary for personal use, must often be determined with relation to the degree and condition of life of the parties. The court has said that such necessary articles include those, the use of which is attended with pleasure and enjoyment, as books, music and musical instruments, as well as those which minister only to strictly physical comfort.[3]

A husband can further make a gift of personal property directly to his wife which will after his death give her a right to it as against his heirs; it must in such case be clearly shown that he made an actual delivery of the property to her with the intention to give it to her, that she continually retained it separate

[1] Cairns *v.* Colburn, 104 Mass. 274.
[2] R. L., ch. 153, § 3.
[3] Hamilton *v.* Lane, 138 Mass. 358.

and distinct from the other property of the husband, and that the rights of the husband's creditors must not be impaired by the gift. He may, however, take back the property at any time during his life, his creditors may attach it as his property, so long as it can be identified, and she can maintain no suit at law in her own name regarding it; [1] and at his death the property may be taken to satisfy his debts, if his other property is insufficient therefor.[2] The case is the same, although the husband, instead of giving directly, deposits money belonging to himself in a savings bank or takes certificates of stock or promissory notes in her name.[3] Similar principles seem to apply in case of gifts from the wife to the husband.

Though a husband cannot make a gift directly to the wife, he may, as in the conveyance of real property, give and deliver personal property to a third person, who may straightway give and deliver the same to the wife, and, although the sole purpose of all parties is to make such transfer from the husband to the wife, the transfer will be valid, if not fraudulent as to creditors.[4]

The common law also permitted a husband and wife, as well as others, to make to each other a *donatio causa mortis*, — that is, a gift under the solemnity of the contemplation of impending death, not

[1] Marshall *v.* Jaquith, 134 Mass. 138; Porter *v.* Wakefield, 146 Mass. 25; Springfield Institution for Savings *v.* Copeland, 160 Mass. 380.

[2] Spelman *v.* Aldrich, 126 Mass. 113.

[3] McCluskey *v.* Provident Institution for Savings, 103 Mass. 300; Towle *v.* Towle, 114 Mass. 167; Fisk *v.* Cushman, 6 Cush. 20.

[4] Brown *v.* Brown, 174 Mass. 197.

only from existing sickness or injuries, but also, it appears, from other causes, as battle or dangers by sea.[1] Such gifts are recognized under our laws.[2]

To establish gifts of this description there should be clear, satisfactory and incontrovertible evidence, not only of the gift and delivery of the property, but of the separate custody of it by the donee.[3]

A gift of trunks and their contents by the handing over the keys of the trunks by the donor to the donee with the declaration that the trunks and contents were the donee's, was held valid.[4]

Only specific articles can be so given, and there must be an actual delivery of them. The gift can be revoked by the giver, and, in fact, is revoked by his recovery from sickness or escape from the threatening peril; and it can, notwithstanding, be taken, if necessary, for the payment of the debts of the giver after his decease.[5]

5. Contracts and Gifts in Equity

It is necessary to add that there are certain transactions in the nature of gifts and contracts between husband and wife, which are treated as of no effect in the ordinary courts of law, but which may be enforced by the courts sitting in equity. Under the later common law, the wife had certain limited rights, particularly under trusts, created by the

[1] II Blackstone, 514.
[2] Whitney *v.* Wheeler, 116 Mass. 490.
[3] Marshall *v.* Jaquith, 134 Mass. 138.
[4] Debinson *v.* Emmons, 158 Mass. 592.
[5] Marshall *v.* Berry, 13 Allen, 43.

English Court of Chancery, which she could enforce in those courts, even against her husband, though such rights were not recognized in the courts of law. These rights, not having been taken away by our statutes, will be recognized by our courts in equity; and it may be contended further that the legislature, in permitting a married woman to hold substantially all her property separately, intended to give her also the remedies formerly attaching in chancery or equity for protecting it from the wrongful acts and possession even of her husband.[1]

As has been previously stated, if the wife places money belonging to herself in her husband's hands, in the absence of anything to indicate the contrary or of fraud, it is supposed that it is put in his hands with the intention that he may use it for the benefit of either or both at his discretion; and there is no presumption that the money is to be repaid by him.[2] If, however, it can be shown that she gave the money to him for him to invest it for her, or with it to purchase certain property, the court may hold that he received the money as a trustee, and that the property purchased belongs to her and not to him, and in equity compel the property to be transferred to her. The husband may thus expressly or by simple implication be a trustee for the wife, or the wife for the husband. She may in equity recover her separate property obtained by him from her by fraud or coercion. In equity, for many purposes, notwithstanding what is usually laid down, the husband and wife are regarded

[1] Fowle *v.* Torrey, Field, Judge, 135 Mass. 87.

[2] Jacobs *v.* Hesler, 113 Mass. 157; Kneil *v.* Egleston, 140 Mass. 202; Clark *v.* Patterson, 158 Mass. 388.

as distinct persons, and capable of contracting at least indirectly with each other,[1] and of maintaining suits in equity against each other.[2]

Under these principles, it was held, in a case in which the wife released her dower in her husband's lands on his verbal promise that he would transfer to her certain shares of stock of equivalent value, that the husband, after her release of the dower, held the shares as her trustee, so that a court of equity would enforce the promise, and that his transfer to her, even after he became insolvent, would be good against his creditors.[3] Under similar circumstances, it was held that a verbal promise by the husband to convey real and not personal property to the wife could not be enforced in a court of law, and that a conveyance of land so made would be void as against creditors.[4]

If a wife loan her husband money, though she can neither in a court of equity or of law compel him personally to repay it, yet such a loan will be a sufficient consideration to make valid, even against his creditors, a conveyance of property through a third person by him to her;[5] and she can maintain a claim against his estate in bankruptcy for money so lent.[6]

[1] Atlantic National Bank *v.* Tavener, 130 Mass. 407; Holmes *v.* Winchester, 133 Mass. 140; Walker *v.* Walker, 9 Wallace, 743.

[2] Lombard *v.* Morse, 155 Mass. 136; Frankel *v.* Frankel, 173 Mass. 214. See also National Granite Bank *v.* Tyndale, 176 Mass. 547.

[3] Holmes *v.* Winchester, 133 Mass. 140.

[4] Holmes *v.* Winchester, 135 Mass. 299.

[5] Atlantic National Bank *v.* Tavener, 130 Mass. 407.

[6] *In re* Blandin, 1 Lowell, 543; Fowle *v.* Torrey, Field, Judge, 135 Mass. 87, 95.

It has seemed proper to give at some length the above cases, involving more or less transactions between husband and wife and their powers to act in relation to their property, not as affording instances of differences or inequalities, the rights of husband and wife being generally the same, but because such transactions, unfortunately for the parties, are of frequent occurrence, and lead to unexpected hardships, and sometimes to complaints, as if the law in this regard bears unequally upon the wife.

6. Conveyance of Property

A husband cannot convey any real property directly to his wife, nor a wife directly to her husband; and a deed purporting to do this would be void. The same object is, however, accomplished by one making a deed to a third person and the third person to the other, or, indeed, by one making a deed to a third person "to the use of" the other.

A married woman may by deed during her life convey all her real property to others than her husband as if she were sole, except that no such conveyance shall extinguish or impair her husband's tenancy by curtesy by the statute or his existing rights to curtesy, unless he joins in the conveyance, or otherwise releases these rights, or unless a court having jurisdiction has decreed that she has been deserted by her husband or is living apart from him for justifiable cause. The tenancy by curtesy as fixed by the Revised Laws, is the right of the husband, on the death of the wife, upon making claim therefor, to

hold one third of her real property for his life; so that in general a wife cannot without her husband's assent so convey her real property as to deprive him after her death, if he survives, of the enjoyment of one third thereof during his life. If, however, on December 31, 1901, the date from and after which the Revised Laws took effect, the husband had a right of curtesy in his wife's real property under the law as then existing, he cannot be deprived of this right by her conveyance of such real property; so that, if on that date the wife held real property and a child has been born alive to them, it seems that the husband is entitled upon making claim therefor to hold all such real property after her death, if he survives her, during his life, notwithstanding her conveyance thereof if made without his assent or release.[1]

If, however, a court having jurisdiction has entered a decree that a married woman has been deserted by her husband, or is living apart from him for justifiable cause, she may convey her real property in the same manner and to the same effect as if she were sole.[2] There seems to be no such provision in favor of the husband.

The husband may by deed during his life convey all his real property to others than his wife, except that no such conveyance shall extinguish or impair the tenancy of dower of his wife, unless she joins in the deed in release of dower or otherwise releases her right of dower. Her tenancy or right of dower,

[1] R. L., ch. 153, § 1; ch. 132, § 1.
[2] R. L., ch. 153, § 36.

both by common law and under the Revised Laws, is the right on his death, upon making claim therefor, to hold, during her life, one third of his real property, other than wild lands. She will not be entitled to dower in wild lands, except wood lots or other land used in connection with his farm or dwelling house.[1]

If, however, land is conveyed to the husband and simultaneously with the delivery of the deed he conveys or mortgages the land to another, it has been held that the husband acquires only an instantaneous seizin, and that the wife will not have a right of dower as, against the grantee or mortgagee.[2] So, on the other hand, it is provided by statute that, if a deed of land is made to a married woman, and she at the time of the execution of the deed mortgages the land in payment of the whole or a part of the purchase money, her husband will not acquire an estate by the curtesy as against the mortgagee.[3] A wife may also be debarred of her right of dower by a jointure settled on her before marriage with her assent, or by a pecuniary provision made for her before marriage in lieu of dower and assented to by her.[4]

The husband and wife may before marriage enter into a contract providing that after the marriage any portion, or the whole of the property of either shall re-

[1] R. L., ch. 132, §§ 1, 3, 5–8.

[2] Holbrook *v.* Finney, 4 Mass. 566; King *v.* Stetson, 11 Allen, 407; Webster *v.* Campbell, 1 Allen, 313; Woodward *v.* Sartwell, 129 Mass. 210.

[3] R. L., ch. 132, § 2.

[4] R. L., ch. 132, §§ 6, 7.

main his or her property or become the property of the other.[1]

The tenancy by curtesy of the husband and the tenancy by dower of the wife, both now giving in general to the survivor the use and income for life of one third of the real property of the deceased, of which neither can be deprived except by his or her assent or release, are more fully explained in subsequent pages.

The tenancy by curtesy and by dower will, however, in most cases be found less valuable than the rights in real property otherwise given, so that it is probable that the survivor will seldom file a claim to take such tenancy in lieu of the rights otherwise given by statute.

In case a sale is made of the real property of either husband or wife, and one of them is insane or otherwise under guardianship, provision is made by statute, by which the guardian of the ward may unite with the other in conveying the interest of the ward in such real property; and, in such case, further provision is made for the reserving and investment of such portion of the proceeds of such sales as should properly come to the ward.[2]

Both husband and wife can during life give, sell, or otherwise dispose of all his or her personal property to others, without hindrance or restriction.[3]

If a married woman is, by reason of insanity or infancy, incompetent to release her right of dower

[1] R. L., ch. 153, § 26.
[2] R. L., ch. 153, §§ 15–25.
[3] Marshall *v.* Berry, 13 Allen 43.

or homestead, a guardian may be appointed for the purpose. Her husband may be appointed such guardian.[1]

By a statute passed in the year 1902, it is provided that the signature of a married woman, though under twenty-one years of age, to any instrument relating to the conveyance of land of her husband shall have the same effect as if she were over that age.[2]

7. Homestead Rights

The homestead statute has given some privileges to both husband and wife, but especially to the wife, which should be mentioned.

Every householder having a family is entitled to an estate of homestead, to the extent of eight hundred dollars, in the land and buildings owned and occupied by him as a residence, provided that his design so to hold the estate has been previously set forth and recorded in the registry of deeds. This estate will continue, not only during the life of such householder, but at his death, for the benefit of his wife and minor children, if one of them occupies the premises, until the youngest child is twenty-one years of age, and until the marriage or death of the widow. Such estate, when once acquired, cannot be attached or taken for the payment of the debts of such householder during his life, or be sold for the payment of his debts or legacies after his decease. No conveyance, by the householder, of property in which such a right of homestead exists, or release or waiver of

[1] R. L., ch. 145, § 15. [2] St. 1902, § 478.

such estate, will convey or defeat his right, or that of his wife or children, unless the wife or, in case of insanity or infancy, her guardian, joins in the deed for the purpose of releasing it. A deed without such release will, however, be valid to pass any title or interest in the property conveyed beyond the estate of homestead. In case the property of the householder is taken from him by an execution or by his insolvency, or conveyed by him without his wife's consent, this estate of homestead remaining may be set apart by the court from that so belonging to the creditors or grantee of the householder.[1]

The estate of homestead gained in one place is lost by the acquiring elsewhere, in accordance with the statute, of a new homestead, but is not lost during the life of the householder by mere abandonment of the homestead as a residence or by any act of his other than a deed made as above stated.[2] A wife cannot by her separate act divest her husband of his right of homestead once acquired; and he, if still occupying the premises, does not lose his right by a divorce or by the death or absence of his wife or children; others may be adopted as members of his household and his right of homestead is retained.[3] Although a person leases a part of a house designed for a single family, or permits another family to occupy a part with him, he has an estate of homestead in the entire house.[4]

[1] R. L., ch. 131,—ch. 145, § 15. See also Silloway *v.* Brown, 12 Allen, 30.

[2] Woodbury *v.* Luddy, 14 Allen, 1.

[3] Doyle *v.* Colburn, 6 Allen, 71.

[4] Pratt *v.* Pratt, 161 Mass. 276.

The will of a householder having such right of homestead, cannot deprive his widow or children of such interest;[1] and, if he dies without leaving a will, his heirs will take his real property subject to such homestead right. The homestead can then be set apart from the rest of the property of the deceased in like manner as the widow's dower, and is additional to the dower interest of the widow and all her rights in the real and personal property of her deceased husband.[2] The title to such estate of homestead, after the death of the husband, is in the widow, so long as she survives and remains unmarried, and in such children as are minors, and neither the widow nor the child by his guardian can convey away her or his part without the assent of the others so interested; but the right of possession and enjoyment is in those only who remain in occupation of the homestead.[3] The widow has been held, however, so to occupy the homestead estate as to retain it under the statute, though she leases a part of it, or even only uses a room in the house for the storing of furniture.[4]

Whether a widow having children would by purchasing a house and occupying it acquire a homestead estate, under the statute, as a householder, is undecided; but it has been held, in the case of an unmarried woman owning her residence and occupy-

[1] Brettun *v.* Fox, 100 Mass. 234.

[2] Monk *v.* Capen, 5 Allen, 146; Cowdrey *v.* Cowdrey, 131 Mass. 186.

[3] Abbott *v.* Abbott, 97 Mass. 136.

[4] Mercier *v.* Chace, 11 Allen, 194; Brettun *v.* Fox, 100 Mass. 234.

ing it with her mother, that the statute giving the right of homestead would not embrace an unmarried woman having no children.[1]

It seems also that if the wife owns a house which is occupied by the family, neither the husband nor the children would be entitled to a homestead estate in it.

8. Descent and Distribution of Property at Death

If no will has been made, the rights of the husband to his wife's property at her death, when he is the survivor, are now in most respects the same as those of the wife to her husband's property when she is the survivor.

(1) If the wife dies leaving issue living, that is children, grandchildren, or other lineal descendants, her husband surviving will be entitled to hold absolutely one third of her personal property and one third of her real property, remaining after the payment of her debts and the charges for her last sickness and funeral and for the settlement of her estate.[2] In ordinary cases there may be a question whether the expenses of the last sickness are not primarily chargeable to the husband.

If the wife dies, leaving kindred but no issue living, her husband surviving will take absolutely five thousand dollars and one half of her remaining personal property and one half of her remaining real property; and if the personal property is insufficient to pay the whole amount of five thousand dollars the

[1] Woodworth *v.* Comstock, 10 Allen, 425.

[2] R. L., ch. 140, § 3.

deficiency may be obtained by a mortgage or sale of real property, if there is any.[1]

If the wife dies, leaving no kindred at all, the husband surviving will take the whole of the wife's remaining real and personal property.[1]

(2) If the husband dies, leaving the wife surviving, the wife will in any case be entitled to her articles of apparel however bought, and the use of her husband's house free of rent for a period not exceeding six months from the time of his death, and she will also be entitled to such parts of the personal property of her husband as the probate court, having regard to all the circumstances of the case, may allow as necessaries for herself and his family under her care, and also such provisions and other articles as are necessary for the reasonable sustenance of the family, with the use of the house and of the furniture therein for six months next succeeding his death. If there is not sufficient personal property to provide the amount of the allowance decreed, the real property, which he has left, may be sold for the purposes.[2]

There may be homestead rights to which the widow is entitled as stated in the preceding pages. All these rights in her husband's estate take precedence of any of his debts or the charges for administering his estate, and are the same whether he dies leaving issue living or leaving no issue or kindred living.

If the husband dies, leaving issue living, the wife will take one third of the personal property and one third of the real property, remaining after the pay-

[1] R. L., ch. 140, § 3.
[2] R. L., ch. 140, §§ 1, 2.

ment of the above allowances and his debts and the charges for his last sickness and funeral and for the settlement of his estate.[1]

If the husband dies, leaving no issue living but kindred other than issue, the wife surviving will take five thousand dollars, and one half of the remaining personal property and one half of the remaining real property, the five thousand dollars to be paid, as in the case of the survivorship of the husband, out of the real property if the personal property is insufficient.[1]

If the deceased leaves no kindred, the wife surviving will take the whole of the remaining real and personal property.[1]

The Revised Laws of 1902 have not, however, entirely done away with the ancient rights of curtesy and dower, as existing before the enactment of the Revised Laws. The curtesy in real estate, to which the husband was entitled on his wife's decease, was the right to the use and income for life of all the real estate belonging to the wife at her decease and also, provided they had had issue born alive during marriage, of any other real estate which she owned at any time during marriage but was conveyed away by her or was transferred by operation of law without his release of his right of curtesy. On the other hand the wife at her husband's decease was entitled to dower, that is, the right to the use and income during her life of one third of all the real property except wild lands, which he possessed at the time of his death, and of all other real property which he

[1] R. L., ch. 140, § 3.

had possessed at any time during marriage but which had been conveyed away by him or transferred by operation of law without her release of dower.

It is now provided that instead of taking the interest in real property given as above, the husband may file his election, within one year after the approval of the the bond of the executor or administrator of the wife's estate, to take what is called his tenancy by curtesy, which is the right to hold for his life one third of her lands, including not only the land held by her at her death but also, similar to the case of dower, one third of the lands possessed by her at any time during marriage and which has been conveyed away by her or transferred by operation of law without his release of curtesy. It is further provided that the husband may claim by election as above his right of curtesy as existing prior to January 1, 1902, (applicable to the whole of the real property of the wife instead of one third) in which case he will take no other interest in the real or personal property of his wife.[1]

In like manner it is provided that the wife may at the decease of her husband, elect to take, instead of the interest above given her, her right of dower.[1]

A widow has, however, no right of dower in wild lands of which her husband dies seized, except woodlots or other lands used with his farm or dwelling-house, nor in such lands conveyed by him though afterwards cleared.[2] The lands of which a widow is thus not dowable, are such tracts of uncultivated or

[1] R. L., ch. 132, § 1. [2] R. L., ch. 132, § 3.

otherwise unimproved land as are held separate and distinct from houses and from cultivated lands and other improved estate; and they are not subject to dower, because they do not yield any annual income or advantage, and the widow could derive no beneficial use except by committing waste, as, for instance, by cutting off the growing timber.[1]

When a widow is entitled to dower or other interest in the real property of her deceased husband, she may, without having her interest assigned, continue to occupy such lands with the heirs or devisees of the deceased, or receive her share of the rents or profits thereof, so long as the heirs or devisees do not object. She may at any time on petition have her interest set off to her in severalty.[2]

The husband who is entitled to tenancy by curtesy in the lands of his wife has, it seems, a similar right of occupation.

This right of election of tenancy by curtesy or tenancy by dower would probably seldom be preferred to the interests in real property otherwise given.

Administration of the estate of a husband who dies intestate will, if she or they are competent or suitable therefor, be granted to his widow or next of kin, or the widow jointly with the next of kin, if the probate court shall so determine. If the deceased is a married woman, her husband, if he is competent therefor, will be entitled to administration,

[1] Conner *v.* Shepherd, 15 Mass. 164; White *v.* Cutler, 17 Pick. 248.

[2] R. L., ch. 132, §§ 12, 9.

unless it is necessary or proper to appoint some other person.[1]

The *usual* rights of husband and wife in respect to the descent and distribution of property, may perhaps be illustrated and better understood by the following table, giving side by side the different rights acquired in the property of the other, after the payment of debts and charges, according as the husband or wife be the survivor, if there is no will.

(1) If one dies, leaving issue living,

Husband surviving takes:	*Wife* surviving takes:
One third of wife's remaining real property absolutely.	Allowance for necessaries at discretion of court, and use of husband's house, and support for six months after husband's death, — all in preference to creditors.
One third of wife's remaining personal property absolutely.	Homestead rights.
	One third of husband's remaining real property absolutely.
	One third of husband's remaining personal property absolutely.

(2) If one dies, leaving no issue living, but leaving other kindred,

Husband surviving takes:	*Wife* surviving takes:
$5,000 and one half of remaining real and personal property.	Allowance, etc, as before.
	Homestead rights.
	$5,000 and one half of remaining real and personal property.

[1] R. L., ch. 137, § 1.

(3) If one dies, leaving no kindred living,

Husband surviving takes whole of wife's remaining real and personal property.	*Wife* surviving takes whole of husband's remaining real and personal property.

In each of the above cases, the husband may elect to take, instead of the interest in real estate so given, his tenancy by curtesy, and the wife may elect to take her right of dower as above set forth.

9. Disposal of Property by Will

A husband and wife may at pleasure dispose of all his or her property, real and personal, by will, unless the survivor shall waive the provisions of the will made for him or for her, by a writing signed and filed in the probate court within one year after the probate of the will. In case of such waiver, the surviving husband or wife will take, instead of the provisions of the will, the same portion of the property of the deceased, both real and personal, which he or she would have taken, if the deceased had died without leaving a will, except that if he or she would thus take real and personal property to an amount exceeding ten thousand dollars in value, he or she will receive, in addition to that amount, only the income during his or her life of the excess of his or her share of such property above that amount, the personal property to be held in trust and the real property to be vested in him or her for life, from the death of the deceased; and except that, if the deceased leaves no kindred, he or she, upon such waiver, will take the interest which he or she would have taken if the deceased had died leaving kindred but no issue.[1]

[1] R. L., ch. 135 § 16.

If, however, a court having jurisdiction, has entered a decree that a married woman has been deserted by her husband, or is living apart from him for justifiable cause, the surviving husband will not be entitled so to waive the provisions of a will made by her.[1]

There is no similar provision debarring a surviving wife under such circumstances from waiving the provisions of her husband's will.

A husband is not entitled to his tenancy by curtesy in addition to the provisions of his deceased wife's will, nor is a wife entitled to her dower in addition to the provisions of her deceased husband's will, unless such plainly appears by the will to have been the intention of the testator.[2]

It is provided by the Revised Laws, taking effect in the year 1902, that every person of full age, that is of twenty-one years, and of sound mind, may, by his last will in writing, signed by him or by a person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his property, real and personal, except such portions as are, by the statutes, given to a husband or wife and to children; and also that a married woman may in the same manner and with the same effect make a will. It thus seems that since the enactment of the Revised Laws it is not required by the statutes, at least, that a married woman, in order to be qualified to make a will, shall be of full age.[3]

It is no longer the case, as it was previous to the

[1] R. L., ch. 153, § 36.
[2] R. L., ch. 135, § 18.
[3] R. L., ch. 135, § 1.

enactment of the Revised Laws in 1901, that, in case of the husband's assent in writing, a wife can make a will disposing of all her property.

The marriage of either a man or a woman acts as a revocation of a will made by him or her before marriage, unless it appears from the will itself that it was made in contemplation of the marriage. If, however, the will is made in the exercise of a power of appointment, and the real and personal property subject to the appointment would not, without the appointment, pass to the persons who would have been entitled to it if it had been the estate and property of the testator making the appointment if he had died intestate, so much of the will as makes the appointment shall not be revoked by the marriage.[1]

The present statute relative to revocation of wills by marriage applies only to cases where the marriage took place on and subsequent to July 1, 1892. If a marriage was made prior to that date, it seems that the rule of the common law still applies, that, in the case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone revoked a will previously made.[2] Shaw, C. J. declares in an early case, "The marriage of a feme sole is held to be a revocation of her previous will or at least a suspension, for there may be some doubt on that point. . . . But where the facts on which such revocation is ordinarily implied have been contemplated and pro-

[1] R. L., ch. 135 § 9. See also St. 1892. ch. 118.

[2] Swan *v.* Hammond, 138 Mass. 45. Swan *v.* Sayles, 165 Mass. 177.

vided for in the will, no such presumption arises, and the will is not revoked."[1]

Under the present statute it has been determined that, when the will is not made in the exercise of a power of appointment, a subsequent marriage will act as a revocation, unless it is apparent on the face of the will itself that the will was made in contemplation of the marriage, either by an express declaration in the will to that effect, or by language in the will from which such contemplation may fairly be inferred. Any evidence not derived from the will itself is excluded from consideration.[2]

10. Marriage Contracts

A man and woman contemplating marriage may at any time before marriage enter into a contract in writing, agreeing that, after the marriage is solemnized, the whole or any designated part of the real or personal property of which either was seized or possessed at the time of marriage, shall remain or become the property of the husband or wife, in accordance with the terms of the contract, in the same manner as if the terms of the contract had been set forth in a deed conveying the property limited. It is further provided that there shall be annexed to such a contract a schedule of the property intended to be affected by it, clearly describing it so as to distinguish it from all other property, and that the contract and schedule, shall either before the marriage or

[1] Warner *v.* Beach, 4 Gray, 162, 163.
[2] Ingersoll *v.* Hopkins, 170 Mass. 401.

within ninety days thereafter, be recorded in the registry of deeds for the county or district in which the husband resides at the time of the record, or, if he is not a resident of this Commonwealth, then in the registry of deeds in the county or district in which the wife resides at the time of the record, if it is made before the marriage, or in which she last resided if made after the marriage. Record must also be made in the registry of deeds of every county or district in which there is land to which the contract relates. If the contract is not so recorded it will be void, except as between the parties thereto and their heirs and personal representatives.[1]

A female minor who has attained the age of eighteen years may, with her guardian, make such marriage contract, or she and her guardian may convey her real and personal property to trustees approved by the probate court, to be held upon the trusts declared in such contract.[2]

A woman may likewise before marriage, by her assent to other provisions in her behalf, bar her right to dower in her husband's estate after his decease; and both parties before marriage may make a valid agreement fixing the rights which either after the death of the other, may claim in the other's estate; and such agreement need not be recorded.[3]

[1] R. L., ch. 153, §§ 26, 27.
[2] R. L., ch. 153, § 28.
[3] R. L., ch. 132, §§ 6, 7; Jenkins *v.* Holt, 109 Mass. 261.

11. Rights of Burial

A burial lot or tomb, other than a lot in an incorporated cemetery or a lot or tomb in a public cemetery in a city or town, descends or may be transferred by will the same as other real property, except that a husband or a wife is entitled to the right of burial for his or her body in any such lot or tomb which the other owned at any time during marriage, notwithstanding any conveyance or any adverse right gained by descent or will, unless he or she shall release his or her right therein.[1]

Lots in incorporated cemeteries and lots and tombs in public cemeteries in cities and towns are held indivisible, and pass, on the decease of a proprietor, to his heirs at law or his devisees, subject to the limitation that, if he leaves a widow and children, they will have the possession and control in common during the life of the widow and, if he leaves a widow and no children, she will have such possession and control during her life. The widow has a right of permanent burial or entombment for her body in such lot or tomb, and can only be removed therefrom to some other family lot or tomb with the consent of her heirs. She may release such right, but no conveyance or devise thereof by any other person can deprive her of it.[2] No similar right seems to exist in favor of the husband.

While there can be no property in a dead body, it is the legal right as well as duty of the husband, and

[1] R. L., ch. 78, §§ 28, 29. [2] R. L., ch. 78, § 26.

not of the next of kin, to dispose suitably by burial of the body of his deceased wife.[1] The wife, undoubtedly, has the same right over the body of her deceased husband, though without a similar legal duty toward it.[2] It has recently been held that the father of a minor child who had died, was as the natural guardian of the child, entitled to the possession of its body for burial.[2]

12. Effects of Separation and Divorce

A married woman whose husband, abandoning and not sufficiently maintaining her, has absented himself from this Commonwealth, or has been sentenced to confinement in the state prison, may be authorized by the probate court, upon her petition, to sell and convey and to receive and receipt for her real and personal property, and any personal property which may have come to her husband by reason of the marriage and remains in this Commonwealth undisposed of by him, or any personal property to which he is entitled in her right, and to use and dispose of the same or the proceeds thereof during his absence or imprisonment, as if she were sole, and this authority will continue until the husband returns to the Commonwealth and claims his marital rights or is discharged from prison.[3] In like manner as already stated, power is given to a married woman who has

[1] Weld *v.* Walker, 130 Mass. 422; Durell *v.* Hayward, 9 Gray, 248.

[2] Burney *v.* Children's Hospital, 169 Mass. 57.

[3] R. L., ch. 153, § 31.

been deserted by her husband or is living apart from him for justifiable cause, and decree thereof has been made by the court, to dispose by deed or will of her real property the same as if she were sole.[1]

There seem to be no similar provisions in favor of the husband.

During the imprisonment of her husband, and during the six months or more of interval after a divorce is granted and before it is made absolute, a wife is endowed with most of the powers to act belonging to an unmarried woman.

Besides the causes for which a divorce from the bond of matrimony will be granted to either party to a marriage, a divorce will be granted, on the libel of the wife, if the husband, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.[2]

Upon a libel by a wife for a divorce for a cause which accrued after marriage, the real and personal property of the husband may be attached to secure a suitable support and maintenance for her and for such children as may be committed to her care and custody.[3] The court may require the husband to pay into court for the use of the wife during the pendency of the libel, an amount which may enable her to maintain or defend the libel, although exceeding the costs which she would be taxed to pay, and may require him to pay to her an alimony or allowance during the pendency of the suit.[4] The court may also, upon the petition of the wife, prohibit the husband from imposing any re-

[1] R. L., ch. 153, § 36.
[2] R. L., ch. 152, § 1.
[3] R. L., ch. 152, § 10.
[4] R. L., ch. 152, § 14.

straint upon her personal liberty during the pendency of the suit.[1] A woman, when granted a divorce, may be allowed to resume her maiden name or the name of a former husband.[2]

After an absolute divorce, the divorced husband and wife are, in general, to all legal intents and purposes, single. They may contract with each other as if they had never been married.[3]

If, however, a divorce is decreed for the wife's adultery, her title to her property will not be affected during her life, except that the court may decree to the husband so much of her real or personal property as it may deem necessary for the support of any minor children of the marriage given to his custody; but if she afterwards marry, all his further interest in her property ceases after her death.[4] The wife, on the other hand, will after divorce have dower in her husband's property, in the same manner as if he were dead, if the divorce was decreed for his adultery or sentence to confinement at hard labor.[5]

13. Married Women coming from Other States or Countries

It is especially provided that when a married woman comes from another state or country into this Commonwealth without her husband, he never having lived with her here, she is given the powers and

[1] R. L., ch. 152, § 15.
[2] R. L., ch. 152, § 20.
[3] Chapin *v.* Chapin, 135 Mass. 393.
[4] R. L., ch. 152, § 23.
[5] R. L., ch. 152, § 24.

rights bestowed by our laws upon married women, and she may transact business, make contracts, sue and be sued, and dispose of her property which may be found here in like manner as if she were unmarried.[1] So when a husband and wife, married in another state or country, come into this Commonwealth, either at the same time or at different times, and reside here as husband and wife, the wife retains all property which she had acquired under the laws of any other state or country, or by any marriage contract or settlement made out of the Commonwealth; and, upon so residing together here, their subsequent rights and liabilities are the same as if they had married at the time of their coming here.[2]

[1] R. L., ch. 153, § 29.

[2] R. L., ch. 153, § 30.

IV

PERSONAL RIGHTS AND OBLIGATIONS

1. The Husband's Authority over the Wife

THE authority which the common law gave the husband over the person of the wife so long as they lived together, has not been directly abridged by statute, and it is difficult to determine now to what extent he can legally control her actions. By the old law, he might give her moderate correction; for, as he was held to answer for her misbehavior, "the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children." Blackstone adds also: "In the politer reign of Charles II., this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege."[1]

In a somewhat recent case in this Commonwealth, it was declared that beating or striking a wife violently with the open hand, is not one of the rights conferred

[1] I Blackstone, 444.

on a husband by their marriage, even if the wife be drunk or insolent.[1]

The husband is certainly to be regarded as the head of the family. He can fix their place of residence and regulate the household. Though the husband and wife occupy a house belonging to the wife, if nothing appears to the contrary, the presumption will be that he is the person in possession and is master of the house, and is responsible under ordinary circumstances for its orderly management. She can, however, take and retain possession and compel his removal from it, as she is under no legal obligation to provide a home for the family.[2]

By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes his right to her services is abridged, though his obligation to support her remains. His right to her services and society is made subordinate to her right to employ her time in the care and management of her property and in the earning of money by performing labor or by carrying on a trade or business. Her right to employ her time for the earning of money on her own account is as complete as his.[3]

The husband still has a right to the society and assistance of the wife and to her aid in the conjugal relation — the right of *consortium* under the common law, for the loss of which he may recover damages, though she at the same time recovers damages for per-

[1] Comm. *v.* McAfee, 108 Mass. 458, 461.

[2] Southworth *v.* Edmands, 152 Mass. 203; Kirchgassner *v.* Rodick, 170 Mass. 543.

[3] Harmon *v.* Old Colony R.R., 165 Mass. 100.

sonal injury and impairment of her capacity to labor. This right is given by the common law to the husband only; but the question has been mooted, whether under the present statutes, the wife would not have the same right.[1]

Some of the authorities intimate that the husband may exercise a gentle restraint over the person of his wife, without however defining what such "gentle restraint" is. He certainly may use such reasonable force as may be necessary to prevent her from using their domicile for an illegal purpose.[2] In order to protect herself, she can upon complaint, in case of ill-usage or cruelty, procure an indictment for assault to be brought against him; and, if the danger of personal violence be sufficient to justify it, she can cause him to give bonds to keep the peace.[3] The court may, on the wife's petition, prohibit the husband from imposing any restraint upon her personal liberty during the pendency of a libel for divorce,[4] or when he fails to furnish her a suitable support, or has deserted her, or when for justifiable cause she is living apart from him;[5] and, upon his conviction for assault upon her, he may further be required to give bonds to keep the peace.[6]

[1] Kelley *v.* N. Y. N. H. & H. R. R. Co., 168 Mass. 308; Bigaouette *v.* Paulet, 134 Mass. 123.

[2] Comm. *v.* Wood, 97 Mass. 225, 228; Comm. *v.* Carroll, 124 Mass. 30, 31.

[3] R. L., ch. 216.

[4] R. L., ch. 152, § 15.

[5] R. L., ch. 153, § 33.

[6] R. L., ch. 220, § 11.

2. Husband's Obligation for Maintenance of Wife

The statutes, in relieving the disabilities of the wife, have not lessened the duties and liabilities of the husband. He is obliged to support the family. He is bound to maintain the wife, and provide for her in a manner suitable to his situation and condition in life, although she has property of her own. He is obliged to provide a home for the family, and the wife is under no legal obligation to allow him to use an estate belonging to her for the purpose.[1] She cannot, however, seize upon any house of his which happens to please her or restrain him from selling or letting his property.[2]

The husband will, in general, be held liable for all ordinary contracts and purchases made by the wife in his name, unless it is shown that he has expressly forbidden others to supply her on his account. Even then, he cannot prevent her from charging him with reasonable necessary expenses, not only for her own support, but also for that of such of their children as may be living with her.[3]

If the husband unreasonably neglects to provide for the support of his wife or minor children he is punishable by fine or imprisonment.[4]

If the husband and wife separate by mutual consent, or the wife lives apart from her husband, and

[1] Southworth *v.* Edmands, 152 Mass. 203.

[2] Goodnow *v.* Shattuck, 136 Mass. 223.

[3] Eames *v.* Sweetser, 101 Mass. 78; Raynes *v.* Bennett, 114 Mass. 424.

[4] R. L., ch. 212, § 45.

no condition or agreement is made that she shall support herself, she not having the means of support and no proper provision being made therefor, if he abandons her, if he drives her from his home without justifiable cause, or if he so conducts himself that she is justified in leaving him by reason of his adultery, his violence, or his cruelty, she will carry his credit with her for necessaries for herself and family. Even in case a suit for divorce is pending, the husband may be compelled to provide the wife with a suitable support and maintenance, and with money sufficient to maintain or defend the suit. On the other hand, the obligation of the husband to maintain his wife ceases, if she wantonly forsakes or without justifiable cause abandons him, or rejects the proper provision he has made for her maintenance, or if by her adultery or otherwise he is justified in withdrawing from her society.[1]

As a general rule, the term, "necessaries," as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband.[2] The term also includes supplies furnished to the wife when she is sick, insensible, or insane, and the reasonable expenses of her funeral and burial after death; and no notice is necessary in order so to charge him.[3] Under the general state-

[1] Alley *v.* Winn, 134 Mass. 77; Mayhew *v.* Thayer, 8 Gray, 172; Camerlin *v.* Palmer Co., 10 Allen, 539; 1 Dane's Abr. 355; R. L., ch. 152, §§ 10, 14.

[2] Raynes *v.* Bennett, 114 Mass. 424, 429.

[3] Cunningham *v.* Reardon, 98 Mass. 538.

ment " that whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular to promote comfort, either of body or mind, may be deemed to be a necessary, for which a wife, under proper circumstances, may pledge her husband's credit," it was held that a husband is liable for legal services rendered the wife for successfully defending her upon a complaint against her for being a common drunkard, instituted by him.[1]

Under some circumstances it seems also that gold watches and chains, books, music, and musical instruments may be regarded as necessaries.[2]

It has been recently held, however, that notwithstanding the legal duty of the husband to see that his wife is buried, he may, if she left property of her own, recover the expenses of her burial from her executor.[3]

It seems there is no obligation on the part of the wife to support her husband, even though he be a pauper and she be possessed of abundant property.

3. Husband's Liability for Wife's Criminal and Illegal Acts

If a wife commits one of the legal offences, or lighter crimes, such as assault and battery, theft or burglary, in the presence of her husband, or so near to him as to be within his immediate influence and control, she is presumed, in the absence of evidence to the contrary, to act under his coercion, and will

[1] Conant *v.* Burnham, 133 Mass. 503, 505.
[2] Hamilton *v.* Lane, 138 Mass. 358.
[3] Constantinides *v.* Walsh, 146 Mass. 281.

be acquitted on the ground of his power to regulate the household, and her duty to obey her husband's commands; and he alone will be regarded and punishable as the guilty party.[1] If a wife, for instance, sells intoxicating liquors in violation of law, the husband will be punishable if the sales are made in his presence, though the house in which they are made is owned or hired by her, and not by him, and he has no interest in the business or its profits.[2] The husband is called upon to use reasonable means to prevent his wife from carrying out an illegal intent.[3] Even the fact that the wife has filed a certificate of carrying on the business on her separate account, in accordance with the statute, does not release the husband from his liability.[4]

In order to render the husband punishable, instead of the wife, for her act, he must be legally present at the time of the act. To establish the fact of such presence, it does not seem to be necessary to show that the offence was literally committed in his sight. If she is near enough to be under his immediate influence and control, though not in the same room, it is sufficient.[5]

Cases may, of course, occur, in which both hus-

[1] Comm. *v.* Neal, 10 Mass. 152; Comm. *v.* Eagan, 103 Mass. 71; Comm. *v.* Wood, 97 Mass. 225, 228; Comm. *v.* Hill, 145 Mass. 305.

[2] Comm. *v.* Carroll, 124 Mass. 30, 31; Comm. *v.* Pratt, 126 Mass. 462, 463.

[3] Comm. *v.* Walsh, 165 Mass. 62.

[4] Comm. *v.* Barry, 115 Mass. 146, 148.

[5] Comm. *v.* Munsey, 112 Mass. 287, 289. Comm. *v.* Flaherty, 140 Mass. 454.

band and wife may be convicted of such an offence.[1] There are also exceptions to the above rule, in the case, for instance, of certain offences in which the wife, rather than the husband, must be presumed to be the guilty party; and she will be punished either alone or jointly with her husband.[2] The presence of the husband is no defence to the wife in crimes which are forbidden by the law of nature, as murder and manslaughter.[3]

The husband is liable in many cases for torts and trespasses of the wife, if done in his presence, it being in like manner presumed that she acted under his influence or control.[4]

The court has, however, declared in a recent case that a necessary consequence of the enlargement of the power of the wife to hold and dispose of property, is a corresponding increase of her responsibility for all acts relating thereto and growing out of her management and control; and it held that the wife is civilly responsible for personal injuries inflicted not in her presence upon a third person, by her husband while acting within the scope of his authority as her agent.[5]

The presumption that the wife in committing crime or doing other illegal acts in presence of the husband, acted under his coercion, may be overcome by showing that in fact she acted without his permission or

[1] Comm. *v.* Tryon, 99 Mass. 442.

[2] Comm. *v.* Cheney, 114 Mass. 281; Comm. *v.* Lewis, 1 Met. 151.

[3] Comm. *v.* Neal, 10 Mass. 152.

[4] Handy *v.* Foley, 121 Mass. 259.

[5] Shane *v.* Lyons, 172 Mass. 199.

coercion.[1] A wife may be held responsible either criminally or civilly for assaults committed of her own free will and while actually under no coercion from him, even although he be present and join therein.[2]

If a wife in the absence of her husband perform illegal or criminal acts, the fact that she acted in obedience to his orders will be no defence as to her, but such direction or instigation would frequently seem to render the doings in law his acts as well as hers, and make him also amenable.[3]

The recent statutes enlarging the rights and privileges of married women in this Commonwealth, have not relieved the husband from his responsibility for his wife's criminal and illegal actions.[4]

4. Rights of Husband and Wife as to Testifying Regarding Each Other

The husband and wife are not allowed to testify as to private conversations with each other.[5] This prohibition includes conversations on subjects which are not confidential in their nature, as for instance, conversations between them relating to business done by one as agent of the other. Abusive language addressed by one to the other when not in conversation may be testified to.[6] Neither husband nor wife can be com-

[1] Comm. *v.* Pratt, 126 Mass. 462, 463.

[2] Shane *v.* Lyons, 172 Mass. 199.

[3] Handy *v.* Foley, 121 Mass. 259.

[4] Comm. *v.* Gannon, 97 Mass. 547; Comm. *v.* Carroll, 124 Mass. 30.

[5] R. L., ch. 175, § 20.

[6] Dexter *v.* Booth, 2 Allen, 559; French *v.* French, 14 Gray, 186; Raynes *v.* Bennett, 114 Mass. 424; Comm. *v.* Hayes, 145 Mass. 289; Fuller *v.* Fuller, 177 Mass. 184.

pelled to be a witness in a trial in any criminal proceeding against the other.[1] These provisions must evidently be regarded as necessary so long as the generally accepted theory of the marriage relation is sustained.

Written communications between husband and wife are, however, not made inadmissible by the statute.[2]

5. Rights to Divorce

Either husband or wife can obtain divorce for adultery, impotency, extreme cruelty, utter desertion for three consecutive years next prior to the filing of a libel, gross and confirmed habits of intoxication caused by the voluntary and excessive use of intoxicating liquor, opium or other drugs, cruel and abusive treatment on the part of the other, or, in case the other is sentenced to confinement at hard labor for life or for five or more years in jail, house of correction, or state prison. The wife is also entitled to divorce if the husband being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.[3]

6. Rights to Care and Custody of Children

The parents of the minor, jointly if living, and in case of the death of either, the surviving parent, if respectively competent to transact their own business, are entitled to the custody of the children and the care of

[1] R. L., ch. 175, § 20.
[2] Comm. *v.* Caponi, 155 Mass. 534.
[3] R. L., ch. 152, §§ 1, 2.

their education until they reach majority or are married, which power enables the parents or parent to control their residence, occupation, employment, and education, and gives the right to their earnings. Except as above, the guardian appointed by the probate court has the custody and tuition of his ward and the care and management of all his estate until the minor arrives at the age of twenty-one years.[1] The court has power at any time to have the minor brought before it, and to issue any appropriate order or decree relative to the minor.[2]

When the parents live separately, or when proceedings for divorce have been begun, or divorce has been granted, or when one of the parents, having the obligation, fails without good cause to furnish suitable support, the court may make decree concerning the custody, care, maintenance, and education of the minor children as considerations for the benefit of the children may require; and, in the absence of misconduct on the part of either, the rights of the parents are to be held equal, and the happiness and welfare of the children are alone to determine in whose custody they shall be placed.[3]

If the probate court finds the parents unfit to have the custody of the children, or if it finds one of the parents so unfit, and the other parent consents thereto, it may give the custody of the children to a guardian by it appointed.[4]

[1] R. L., ch. 145, § 4; St. 1902, ch. 474.
[2] St. 1902, ch. 324.
[3] R. L., ch. 152, §§ 25–28; ch. 153, §§ 33, 37; Dumain *v.* Gwynne, 10 Allen, 270.
[4] St. 1902, ch. 474.

7. Guardianship of Children

Neither husband nor wife, as parent, would have the right to, or control of property coming to children by gift, bequest, or devise; but the probate court may appoint a guardian, who shall have the care and management of all such property.[1] Power is, however, given to the father to appoint by will, subject to the approval of the probate court, a guardian who shall have, after the death of the father, the same powers and duties with regard to the person and estate of the ward as a guardian appointed by the court. The same power of appointment is given to the mother in case the father dies without exercising such power.[2]

The marriage of a female minor deprives her parents or guardian, as the case may be, of all right to the care, custody and education of the minor, but does not deprive the guardian of his power over her property.[3] When a married woman owns property, a guardian may be appointed for her, on notice to her husband, for the same causes as for a single woman; but such guardian will not be entitled to the care, custody, or education of his ward, except in case of the insanity of her husband, or in case her husband abandons her by absenting himself from the Commonwealth and making no sufficient provision for her. Her guardian cannot apply her property to her maintenance, or to that of her family, while she is married,

[1] St. 1902, ch. 474.

[2] R. L., ch. 145, §§ 4, 5.

[3] R. L., ch. 145, §§ 13, 37; Bartlett *v.* Cowles, 15 Gray, 445; Walsh *v.* Young, 110 Mass. 396.

unless he is authorized so to do by the court, on account of the husband's inability to furnish such suitable maintenance or for other cause which the court considers sufficient.[1]

The marriage of a minor son, with the father's consent, works an emancipation of the minor husband. He is freed from parental control and has a right to his own earnings. It is probable that if the marriage is made without the father's consent, the same results would follow. At any rate such a minor husband is entitled to his own wages, so far as they are necessary for his support and that of his wife and children.[2] A minor husband has been held liable for necessaries furnished for himself and his family.[3]

8. Rights to Property of Children

Property belonging to children of whatever age dying unmarried and without issue, descends in equal parts to the father and mother, and in case one has died, then wholly to the other.[4]

An illegitimate child and his lawful issue will be entitled, to the same extent as other children, to take the property of his mother or maternal ancestor at her decease; and, if an illegitimate child dies without a will and without issue, his mother, if living, will take his estate, or, if the mother also is dead, the estate will descend to the persons entitled by inherit-

[1] R. L., ch. 145, §§ 13-15.
[2] Comm. *v.* Graham, 157 Mass. 73.
[3] Davis *v.* Caldwell, 12 Cush., 512.
[4] R. L., ch. 133, § 1; ch. 140, § 3.

ance through her.[1] If the parents of an illegitimate child intermarry and the father acknowledges him as his child, the child shall be considered as legitimate.[2]

9. Obligation for Maintenance of Children

The father is bound to support and maintain his children in a suitable manner during their minority, even though they have property of their own, and is liable to fine or imprisonment for unreasonably neglecting to provide for their support.[3]

This obligation for the support of his child continues when the wife justifiably leaves her husband taking the child with her,[4] but, in case the wife without justifiable cause leaves her husband taking a child with her, he will not be held liable for such support, if he is able and declares his willingness to support it.[5] If the care and custody of the child have been given to the mother by decree of the court, the father is no longer liable except as ordered by the court.[6] If a divorce has been granted on the ground of adultery committed by the wife, the court may decree to the husband so much of her separate property as it considers necessary for the support of minor children who have been decreed to his custody.[7]

[1] R. L., ch. 133, §§ 3, 4; ch. 140, § 3.
[2] R. L., ch. 133, § 5.
[3] R. L., ch. 212, § 45.
[4] Reynolds *v.* Sweetser, 15 Gray, 78.
[5] Baldwin *v.* Foster, 138 Mass. 449.
[6] Brow *v.* Brightman, 136 Mass. 187.
[7] R. L., ch. 152, § 23.

While the father is living the mother is under no legal obligation to support the children, and at his death, the mother, it seems, is in general bound to support the children only in case she has sufficient means for the purpose and the children have no property of their own, or in case she is acquiring their earnings.[1] If the children have property, the mother can charge them for the cost of their support above their earnings, though they live with her.[2]

If, however, a minor child, who has a father living, has property sufficient for his maintenance and education in a manner more expensive than the father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the probate court may order that such expenses therefor, as it determines to be just and reasonable, may be defrayed out of the minor's own property.[3]

By reason of the obligation of the father to support and educate his children, he is entitled to their earnings during their minority, and, in case of injury to them caused by the negligence of another, may recover for loss of their services, as well as for labor performed and expenses incurred in their care and cure. It seems that when a minor child is, after the death of the father, supported by the mother, the mother is in like manner entitled to the

[1] Dawes *v.* Howard, Parsons, C. J., 4 Mass. 97, 98; Gleason *v.* Boston, 144 Mass. 25; Horgan *v.* Pacific Mills, 158 Mass. 402.

[2] Whipple *v.* Dow, 2 Mass. 415.

[3] R. L., ch. 145, § 29.

earnings of the child, and can in like manner recover for loss of services and for labor and expenses.[1]

A husband is, in general, not bound to support the children of his wife by a former marriage;[2] but the Supreme Court has held that a husband who receives into his family such children, has, in the absence of any agreement or circumstances indicating a different arrangement, not only a right to their services, but is liable for their support and education.[3]

If a guardian, other than the parents, has been appointed and has become entitled to the custody of a child, either parent may by the court be required to contribute to the support and maintenance of the child, in such amounts and at such times as the court determines to be just and reasonable.[4]

The mere fact that a minor had a father, mother or guardian, no one of whom did anything toward his support, does not affect the obligation of the minor or his estate to pay for that which was actually necessary when furnished, if he has the means. It has been held that a child, whose parents and guardian had no means with which to support him, but who had an expectation of a fortune, would be liable to pay a person, who furnished him a support and education suitable to such expectation, a reasonable sum therefor.[5]

[1] Horgan *v.* Pacific Mills, 158 Mass. 402; Gleason *v.* Boston, 144 Mass. 25.

[2] Cole *v.* Eaton, 8 Cush. 587.

[3] Mulhern *v.* McDavitt, 16 Gray, 404.

[4] R. L., ch. 145, § 28.

[5] Trainer *v.* Trumbull, 141 Mass. 527.

Both father and mother, as well as other kindred, are under legal obligation for the support of pauper children, to a city or town which furnishes such support, though the mother is not liable to criminal prosecution for the enforcement of such obligation.[1]

[1] R. L., ch. 81, §§ 10, 11.

V

GENERAL SUMMARY

THE foregoing pages contain substantially the differences which the law of Massachusetts now makes between men and women, and husband and wife. The changes which have been wrought in the direction of equality or similarity of rights, particularly in property, during recent years, have been many and great.

In the previous edition of this statement, in the year 1884, various differences or inequalities, particularly in relation to the respective rights of the husband and wife in the conveyance of real estate, their powers to dispose of property by will, and the respective rights of one to take the property of the other upon his or her decease, were noted. It was then suggested that it was but logical to make certain changes by which the rights of married women in property and in reference to the maintenance and earnings of children would more nearly correspond to those of their husbands. In the score of years which have since passed, all these changes in favor of married women have been substantially accomplished.

If the advantages which men now have under the law over women, were to be weighed against the advantages which women possess over men, it would

be a mooted question as to which side would turn the scales.

Men and women are equally entitled to citizenship; women, however, are not, as men, entitled to vote in elections, except for school committees; and they are not entitled to hold judicial offices or other offices established by the Constitution of the Commonwealth, but they are by legislation entitled to hold many other offices, and are elected and appointed to many administrative and local offices without legislative sanction.

On the other hand, women enjoy many privileges and exemptions not given to men. They are exempt from military and jury duty; they are not required to pay a poll tax, and a considerable amount of property of women is under particular circumstances exempt from taxation; they are exempt from arrest for many of their acts; they have peculiar privileges in the acquiring of settlements for support in cities and towns; in some respects they are able to act at an age less than majority; and they enjoy a great and peculiar protection in matters of labor.

In the marriage relation there is undoubtedly some authority given to the husband over the wife; he is, to a slight degree, entitled to her services, and to a greater extent to the services of the minor children; and he is endowed with the headship of the family; there is in a measure the presumption that personal property of the wife in the possession of the husband belongs to the husband. The rights of the husband and wife in relation to the acquiring, holding, and disposing of property and to the control of minor children have been made substantially equal.

In other respects the differences existing in the rights and privileges of husband and wife are almost entirely in favor of the wife. The wife enjoys special privileges in the matter of acquiring citizenship by naturalization; the husband is bound to support the wife and minor children, while she is exempt from like obligations; the husband is in many cases liable for the wife's debts, while she is not liable for his debts; the wife can make valid claim to gifts from the husband, while like gifts to the husband cannot be held by him as good against the wife; the wife has privileges over the husband in the making of marriage contracts; the husband is liable for many of the wife's criminal and tortious acts while the wife is free from a like liability; in the case of separation and divorce the wife is entitled to various allowances and may claim from her husband the expenses of her maintenance and support and even for prosecuting a suit against him; she has an advantage in the making of her will; she enjoys special rights in property on coming to the Commonwealth and residing here without her husband; at the husband's decease the wife is entitled to certain rights of burial and in life insurance not given in like case to the husband, to the use of her husband's house and to maintenance and support for a period of time, to valuable rights of homestead for herself and her children, and to an allowance in money from his estate, according to her condition in life, all in preference even to his creditors.

Other changes which have at times been mooted have not been effected.

There are certainly reasons why the husband and

wife should not make conveyances of real property directly to each other, and there are stronger reasons against rendering it easier for them to make gifts of personal property to each other, on account of the greater facilities which would be thus offered for defrauding creditors.

The changes which have been effected would render it proper to make the husband's and the wife's property more equally chargeable with the support of their children, and to cause the children's earnings to contribute to the source from which their maintenance is drawn. The withdrawal from the husband of whatever legal powers of correction and restraint he may have over the wife, if desirable, should relieve him from all responsibility, as husband, for her tortious and criminal acts. The husband's liability to support the wife, and the want of any obligation on the part of the wife to support the husband, remaining unchanged, his natural position in the family should entitle him, rather than her, to fix their domicile, and permit him to retain a certain headship in the family.

The direct power given to men in the making of laws and the naming of law-makers is still offset by or united with their responsibility in enforcing the laws, but whether properly or not involves political and social considerations which are subjects of discussion.

It is readily seen that the laws fixing the legal status of women in this Commonwealth have not come about as a logical, well-considered, and well-balanced system, but are rather, as has been before intimated, a fabric in which the original groundwork has almost disap-

peared from sight under the constant amending which has been going on for many years. The theory of the common law has thus been almost entirely overthrown by statute. But laws in relation to any subject, which are the result of a gradually changing public sentiment, will naturally and necessarily be a complicated growth and never become a finished code; and they will present inconsistencies and imperfections, so long as inconsistency and error are found in public opinion. Not infrequently, new defects and evils, greater or less, arise in the overthrowing of old systems for the purpose of remedying past abuses and injustice.

It was declared in the previous statement of the status of "Women under the Law of Massachusetts," published in the year 1884, that "Putting aside, however, the disputed question of suffrage, should the few further changes suggested be made, as now seems likely soon to be done, we should be much nearer the truth, than was Blackstone a century ago in speaking of the common law, to say, with a similar degree of pride, of the statutes of this Commonwealth, "so great a favorite is the female sex of the laws" of Massachusetts. The changes then suggested in favor of the wife have all been substantially made the law of the Commonwealth.

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